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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5847

HARRELL ALEXANDER, SR.,
Petitioner

v.

GARDNER-DENVER COMPANY,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 466 F.2d 1209 (10th Cir. 1972), and appears at pages 45-47 in the Appendix. The District Court opinion appears in the Appendix at pages 33-43 and is reported in 346 F. Supp. 1012 (D. Colo. 1971).

STATUTORY PROVISIONS INVOLVED

This suit was brought pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e et seq. Also involved is section 203(d) of the National Labor Relations Act, 29 U.S.C. §173(d).

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on August 11, 1972, affirming, *per curiam*, the district court's dismissal of Petitioner's claim ordered on July 7, 1971. On November 4, 1972, Mr. Justice White signed an order extending the time for filing this petition for certiorari to and including December 8, 1972. The petition was filed on December 8, 1972 and was granted on February 20, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether an employee who claims he has been the victim of racial discrimination and pursues both his contractual remedies by filing a grievance and his federal rights by filing administrative charges under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. is precluded from maintaining an action in federal court as a result of an unfavorable arbitration decision entered *after* filing Title VII charges?

2. What are the appropriate standards to be applied by the district courts in those cases in which an employee has protested allegedly improper conduct of his employer both by filing a grievance under the collective bargaining agreement and by filing charges of racial discrimination pursuant to Title VII of the Civil Rights Act of 1964?

STATEMENT OF THE CASE

Petitioner Harrell Alexander, a black man, was employed by defendant-appellee from May of 1966 until his discharge on September 29, 1969. Petitioner was hired for work in the Yard Department and, on June 11, 1968, was assigned to a trainee's position in the Drill Department. It was from this latter position that he was fired.

On September 29, 1969, the company discharged Petitioner allegedly because his performance was poor in that he had accumulated an excessive amount of scrap. Pursuant to the contractual grievance procedure, Petitioner, on October 1, 1969, filed a grievance which stated that "I feel that I have been unjustly discharged and ask that I be reinstated with full seniority and pay." (App. 32) The grievance did not allege that race was the reason for the discharge.[1]

The Company denied the grievance at Steps 1 through 4 of the process. The issue of racial discrimination was not raised by the Union, acting on behalf of the grievant, at any of these intermediate Steps in the grievance procedure. (App. 11-12)

Failing to resolve the grievance by direct discussion, the matter was taken to arbitration. The scope of the arbitrator's authority is set out in the contract in Section 5 of Article 23:

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[1] Article 5 of Section 2 of the Collective Bargaining Agreement contains an "anti-discrimination" clause, but there is nothing in the record to indicate that the petitioner's grievance was under this clause. Rather, the grievance appears to have been filed under Section 6(a) of Article 23 which provides: "No employee will be discharged, suspended, or given a written notice except for just cause." (App. 28)

"The arbitrator shall not amend, add to, or change any of the provisions of this Agreement, and the arbitrator's decision must be based solely upon the interpretation of the provisions of this Agreement." (App. 28)

At the arbitration hearing, held on November 20, 1969, the only mention of the issue of racial discrimination occurred when the Union recited a written statement previously prepared and sent to the Union by the grievant on October 10, 1969. (App. 13). The only portion of that statement which could possibly be interpreted to refer to racial discrimination is as follows:

"I am knowledgeable that in the same plant others have scrapped an equal amount and sometimes in excess but by all logical reasoning, I, Harrell Alexander, have been the target of preferential discriminatory treatment." (App. 30)

Petitioner contended that at the hearing his Union representative "rearranged" this statement and "weakened it down". (App. 13)

At both the arbitration hearing and at the earlier hearing Steps, Petitioner was not represented by his own counsel or by an attorney assigned by the Union. He was represented by Union officials. At Step 4 of the grievance process, but not at the arbitration hearing, Petitioner was accompanied by his pastor. (App. 12).

Petitioner felt that the Union was not representing his interests in the grievance process, especially as to his feeling that he was discharged because of his race. (App. 13-14) He also acknowledged that he was incapable of representing himself. (App. 14) For this reason before the grievance process reached the arbitration stage, Petitioner filed a formal complaint of racial discrimination under the provisions of the Colorado Civil Rights Act because

he believed the Union would not represent his interests with respect to his belief that he had been discriminated against because of his race. (App. 14)

The EEOC assumed jurisdiction over Petitioner's administrative charges of racial discrimination on November 5, 1969. In the charge filed with EEOC, Petitioner alleged that he was discharged when white employees, similarly situated, were retained as employees.

The arbitrator issued his decision on December 30, 1969. The decision occurred after the Colorado Civil Rights Commission had terminated proceeding and after the Petitioner's EEOC charge had been pending with the Federal Commission for over five weeks. The arbitrator, without commenting on or even acknowledging there was a racial discrimination issue in the case, held that Petitioner was discharged for good cause. The arbitrator noted that the Union failed to present any evidence in support of the Petitioner's claim that as to all employees there existed an historic shop practice to transfer, rather than discharge, an employee who accumulated excessive scrap. (Arb. Dec. pg. 5) (App. 22) Based on the allegation that such a practice existed, the arbitrator "suggests, nothing more, that the Company and the Union get together in an effort to ascertain" whether petitioner could be reinstated in the job he held prior to entering the training program (*ibid.*).

Upon failure of the EEOC to find reasonable cause to credit the charge of discrimination, the Commission issued to the Petitioner a "Notice of Right to Sue." Petitioner sought and was granted appointed counsel and suit was authorized without payment of fees, cost, and securities. Thereafter suit was filed, and on defendant's motion for summary judgment, the district court granted summary judgment and dismissed the action on the sole ground that petitioner's pursuit of his contractual

remedies to final arbitration award barred his cause of action under Title VII of the Civil Rights Act of 1964. In doing so, the district court did not consider the adequacy of the arbital process, either substantively or procedurally, nor did it even analyze whether the issues presented to the arbitrator were the same as those presented to the court. Rather, it made the sweeping holding that "when an employee voluntarily submits a claim of discrimination to arbitration . . .–a submission which is binding on the employer no matter what the result–the employee is bound by the arbitration award just as is the employer." In doing so the district court purported to rely on *Dewey v. Reynolds Metals Co.*, 429 F.2d 364 (6th Cir. 1970) aff'd by an equally divided Court 400 U.S. 1008 (1970).

On appeal to the Court of Appeals for the Tenth Circuit, the Equal Employment Opportunity Commission filed an extensive *amicus* brief in support of Petitioner's position that in the circumstances of his case, he should not be barred from pursuing his federal remedies. Nonetheless, the Tenth Circuit affirmed the district court in a *per curiam* opinion, which adopted the district court's opinion without even discussing the issues raised and authorities cited by Petitioner and EEOC in their respective briefs and without stating independent reasons or analysis. Thus, the case stands before this Court in a procedural posture in which it must be assumed that Petitioner has a litigable claim of racial discrimination under Title VII of the Civil Rights Act of 1964 which the courts below have refused to hear solely because of the arbital award.

SUMMARY OF ARGUMENT

The decisions of the courts below deny petitioner the opportunity to present the merits of his statutory claim of racial discrimination to the federal courts solely because of the arbitration decision on his contractual claim. The issue underlying these decisions—the effect of the utilization of the arbital process on an individual's right to pursue statutory remedy for discrimination in employment for reasons prohibited by Title VII of the Civil Rights Act of 1964—is one which has caused division in the lower federal courts.[2] The conflict and confusion

[2] See *Hutchings v. U.S. Industries*, 428 F.2d 303 (5th Cir. 1970) (unfavorable arbitration award does not bar later Title VII charge and suit); *Bowe v. Colgate Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969) (parallel prosecution in court and through arbitration is permissable as long as duplicate relief or unjust enrichment does not result); *Fekete v. U.S. Steel Corp.*, 424 F.2d 331 Fn. 3 (3rd Cir. 1970) (arbitration award does not render moot a continuing violation of Title VII); *Rios v. Reynolds Metals*, 467 F.2d (5th Cir. 1972) (deference to arbitration award only proper where adequate safeguards are made to assure public interest is served); *Dewey v. Reynolds Metals Corp., supra* (Title VII remedy barred by unfavorable arbitration award); *Spann v. Joanna Western Mills*, 446 F.2d 120 (6th Cir. 1971) ("pursuit of arbitration, without some simultaneous use of court or agency processes, precluded judicial jurisdiction to enter review the arbitrator's decision"); *Newman v. Avco Corp.*, 451 F.2d 743 (6th Cir. 1971) (unfavorable award does not bar Title VII where grievance machinery and Title VII rights are pursued simultaneously); *Thomas v. Philip Carey Mfg. Corp.*, 455 F.2d 911 (6th Cir. 1971) (favorable arbitration award bars Title VII claim).

The issue has also caused considerable comment among the commentators. See e.g. Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration under Title VII*, 69 Mich. L. Rev. 599 (1970); Gould, *Racial Equality In Jobs and Unions, Collective Bargaining, and the Burger Court*, 68 Mich. L. Rev. 237 (1969);

among the circuits will continue until this Court definitively resolves the issue and sets forth standards for the lower courts to apply. For this reason, we deal below first with the overall issue of the appropriate rule of law to be applied in these cases and then deal with the specific circumstances of this case.

I.

A Rule Which Precludes the Federal Courts from Hearing the Merits of a Claim of Race, Sex, National Origin or Religious Discrimination Because the Claimant Has Pursued His Contractual Rights To Utilize the Grievance-Arbitration Machinery Is Contrary to the Intent of Congress and Is Unwise as a Matter of Policy.

A. Congress Has Made the Federal Courts the Final Arbiter of Claims of Racial Discrimination.

1. The private charge and private right of action in federal court are central to the enforcement scheme under Title VII. Congress has given federal courts a special responsibility to effectuate the policies embodied in Title VII.

2. The public policy against employment discrimination is so strong that Congress and the Executive have fashioned a variety of remedies which are parallel and

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Gould, *Black Power in the Unions: The Impact Upon Collective Bargaining Relationships*, 79 Yale L. Rev. 46 (1969); Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. Penn. L. Rev. 40 (1969); Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. Chi. L. Rev. 30 (1972); Platt, *Practical Problems in Handling of Grievance and Arbitration Matters*, 3 Ga. L. Rev. 398 (1968); Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Har. L. Rev. 1109, 1222 (1971); Blumrosen, *Labor Arbitration, EEOC Conciliation and Discrimination in Employment*, 25 Arbitration Journal 88 (1970).

overlapping. These remedies are intended to supplement each other and not preclude the others. The arbitration process has not been given the special status under Title VII that it has under the Labor Act and is certainly entitled to no greater deference than any of the other remedies for employment discrimination.

B. The Differing Purposes of Title VII and the Arbitration Process Make Arbitration an Inappropriate Mechanism in Which To Entrust Ultimate Responsibility for Enforcing the National Policy Against Employment Discrimination.

1. The purpose of arbitration is to reinforce the collective bargaining process and promote industrial harmony even at the expense of minority rights; it is an important mechanism under the National Labor Relations Act for achieving these ends. Nonetheless, the National Labor Relations Board does not preclude itself from hearing an unfair labor practice charge which has been the subject of an arbitration award. Surely, under Title VII, with its emphasis on individual and minority group rights, arbitration is entitled to no greater deference than it is given by the Labor Board.

2. The very nature of the arbitration process makes it an inappropriate mechanism for resolving employment discrimination claims. The process owes its existence to the collective bargaining agreement—an agreement which may itself violate Title VII. This results in a conflict of interest between the union which processes the grievances and the grievant who may have Title VII claims against the union; it also presents grave problems to the arbitrator, who may have conflicts of his own and who is limited in his authority to decide issues and order remedies in conflict

with the provisions of the agreement. This situation is exacerbated by the fact that the grievant is usually not represented by his own counsel but must rely on the union to process the claim. Moreover, the need to make the arbitration process speedy and inexpensive requires procedural shortcuts such as no discovery procedures, no adherence to formal rules of evidence, no cross examination, no swearing of witnesses and no fact finding which make the process unreliable as a means of resolving the complex issues of fact in employment discrimination cases.

II.

The National Policy Against Racial Discrimination in Employment and the National Labor Policy Can Best Be Served by Giving an Arbital Award Only Such Evidentiary Weight as It Deserves.

It is clear that the public interest in *ending* employment discrimination is best served by having a federal court examine on the merits all such claims. If reasons are to be found which require the federal courts to defer to arbital awards, these must be reasons other than the policy against racial and other forms of employment discrimination. The reasons advanced for undermining the federal policy against employment discrimination–the burden on the employer of being bound by arbitration when the employee is not and the assertion that employers will lose incentive to enter into arbitration clauses–are not substantial enough reasons for overriding this "highest priority" policy. It is simply absurd to suggest that giving a lowly David (the employee) two opportunities to take on Goliath (the employer) will give David an unfair advantage over Goliath. The employer's reason for entering into an

arbitration clause is the *quid pro quo* of a no strike clause; thus there is little danger to the arbitration process from making it non-binding with respect to employment discrimination claims. Indeed, the grievance machinery will be reinforced by a rule which encourages employees to use it without fear of losing Title VII rights.

III.

Deferral to the Arbital Award in the Instant Case Would Be Improper and Unfair.

In the instant case, petitioner filed his Title VII charges prior to the arbitration hearing; he informed the arbitrator that his claim of racial discrimination was before appropriate administrative agencies and he complained that the union did not adequately present his claim to the arbitrator. The arbitrator decided that petitioner was discharged for just cause, but did not decide any issue of racial discrimination. He specifically noted that no evidence was presented on the issue of prior shop practice which was crucial to a determination of the discrimination issue. These circumstances highlight the deficiencies of using the arbital process for the purpose of resolving Title VII claims. To defer to the arbital award in this case would be manifestly unwise and unjust.

ARGUMENT

The decisions of the district court and the court of appeals are inconsistent with the decisions of other courts which have addressed themselves to this question and elevate the private relief system of a collective bargaining agreement over the protection of the public interest embodied in Title VII of the Civil Rights Act of 1964. The decision is in conflict not only with those of other courts in cases arising under Title VII, but also with

decisions of this court dealing with the interplay of rights and remedies arising under labor agreements and also under federal law. For, as we shall show below, despite the continued emphasis upon the use and finality of arbitration of matters arising under labor agreements, this Court has steadfastly held that where contract rights and rights involving the public interest arising under statute co-exist or overlap, the adjudicating authority created by statute always has the right and the responsibility to make final decision *in the protection of the public interest. Carey v. Westinghouse,* 375 U.S. 261 (1961); *Smith v. Evening News Association,* 371 U.S. 145 (1962). The decision of the arbitrator is afforded such weight as it may deserve under the circumstances of the particular case, but in no case may the mere fact of arbitration oust the adjudicating authority of its jurisdiction, or its right to disagree with the arbitrator.[3]

Moreover, to the extent that these cases announce a rule which allows arbitrators such power over other claims of race, sex, national origin, and religious discrimination, they strike at the very heart of the federal apparatus for enforcing the laws against employment discrimination—the private charge of discrimination; it is the private charge which sets in motion almost all of the efforts by the executive and judicial branches of the federal government aimed at ending racial and other forms of employment discrimination.

We show below that the serious detrimental effect on enforcement of the laws against racial discrimination is

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[3]In the instant case, since the matter of racial discrimination was not even before the arbitrator, it is clear that the lower courts were relying solely on the fact that arbitration occurred. This degree of commitment to the arbital process manifestly overstates the case for arbitration. See, *Carey v. Westinghouse,* supra.

contrary to the intent of Congress, unwise as a matter of policy and unjustified by any substantial countervailing interests. Our position is that any rule precluding a federal court from hearing on a charge of employment discrimination because of an arbital award should not be allowed. We will first show that the position taken by the courts below—that the federal courts are without power to adjudicate charges of employment discrimination which have previously been the subject of an arbitration award—is unacceptable. We will then demonstrate that there are no circumstances under which pursuit of grievance machinery to arbitration should prevent a federal court from reaching the merits of a charge of employment discrimination. Finally, we consider the specific circumstances of the instant case which make the decisions of the courts below to deprive Petitioner of his day in court manifestly unjust.

I.

AN ARBITRATION AWARD SHOULD NOT PRECLUDE A PRIVATE RIGHT OF ACTION IN FEDERAL COURT.

A. Congress Made the Federal Courts the Final Arbiter of Claims of Racial Discrimination and Entrusted Them With the Responsibility of Enforcing This Policy.

1. *The Importance of the Private Right of Action in Federal Court*

The courts below have failed to carry out the responsibilities placed upon federal courts by Congress to execute the national policy against racial discrimination in employment embodied in the Civil Rights Act of 1964. Since the passage of Title VII, the private right of action has been and still is the principal means of enforcing the federal laws against racial discrimination. Indeed, prior to

the recent 1972 amendments to Title VII, a law suit by a private party was the only method of gaining enforcement of these laws. Thus, as the court stated in *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1005 (5th Cir. 1969):

> "The suit is between private parties. The burden of enforcement rests on the individual through his suit in Federal District Court. But charges must first have been filed with EEOC. Consequently, the filing charges and the giving of information by employees is essential to the Commission's administration of Title VII, the carrying out of the congressional policy embodied in the Act and the invocation of the sole sanction of Court compulsion through employee instituted suit."

And as the Court of Appeals for the Second Circuit recently noted, the private suit under Title VII remains an important part of the enforcement process even now that EEOC has been granted enforcement powers:

> "Under Title VII since its inception, moreover, the individual has played a significant role in its enforcement. *Jenkins v. United Gas Corp.*, 400 F.2d 28, 32 (5th Cir. 1968). This is equally true after the amendment of Title VII by the Equal Employment Opportunity Act of 1972, 1972 U.S. Code Cong. & Ad. the Equal Employment Opportunity Commission to bring a Title VII suit in the name of the Government, individuals party to Commission conciliation proceedings in the same action may intervene in such suits, and in those brought by the Attorney General, *id.* §706(f)(1), 1972 U.S. Code Cong. & Ad. News 817-18 and presumably individuals not party to the Commission proceedings may institute a suit despite any legal action taken by the Commission or the Attorney General." *Williamson v. Bethlehem Steel Co.*, 468 F.2d 1201, 1204 (2d Cir. 1972) (Footnote omitted.)

Moreover, even with its new enforcement powers, EEOC is dependent primarily upon private charges of discrimination to initiate its processes.[4]

The various courts of appeals have vigorously responded to the responsibilities placed upon them by Congress. *Culpepper v. Reynolds Metals*, 421 F.2d 888 (5th Cir. 1970) ("It is . . . the duty of the courts to make sure that the Act works and the intent of Congress is not hampered by a combination of strict construction and a battle with semantics"); *Jenkins v. United Gas*, 400 F.2d 28 (5th Cir. 1968) (Federal court which fails to order class relief is "itself being the instrument of racial discrimination"); *Rosen v. Public Service Electric & Gas Co.*, 409 F.2d 775, 781 (3rd Cir. 1969) (Courts have the duty to assure that when "formal proceedings have ended the ugly face of bias does not reappear"). These courts have recognized that the problems of racial and other forms of employment discrimination are so deeply rooted that unless the federal courts meet their responsibilities, the Congressional intent to end employment discrimination will not be realized.

Moreover, especially with respect to the question of whether the federal courts will delegate this responsibility to an arbitrator selected by the very parties who are charged with discrimination, two courts of appeals have emphatically rejected such an abdication. As the Fifth Circuit stated in *Hutchings v. U.S. Industries:*

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[4]The EEOC is empowered under Section 706(f)(1) (42 U.S.C. §2000e-5(f)(1) to bring suit within thirty days after a charge is filed with it. Although section 706 does provide for the filing of charges by commissioners of the EEOC, this is a relatively rare occurrence and the overwhelming majority of cases are initiated by a charge filed by a private party.

"the trial judge in a Title VII case bears a special responsibility in the public interest to resolve the employment disputes, for once the judicial machinery has been set in train, the proceeding takes on a public character in which remedies are devised to vindicate the policies of the Act, not merely to afford private relief to the employee . . . Congress . . . has made the federal judiciary, not the EEOC or the private arbitrator, the *final* arbiter of an individual's Title VII grievance." 428 F.2d at 311, 313-314).

And as the Seventh Circuit stated in *Bowe v. Colgate:*

"the trial court bears a special responsibility in the public interest to resolve the dispute by determining the facts regardless of the position of the individual plaintiff.' 416 F.2d at 715.

2. *The Federal Court Action is De Novo*

Congress has made clear its intent that the federal courts resolve *de novo* all issues of racial discrimination which are properly before them. Thus, under Title VII findings by either State and local agencies or by the EEOC cannot preclude federal court hearings on the merits of claims of employment discrimination.

Under Title VII, as amended, in states where there are state and local agencies to deal with charges of employment discrimination, a charging party must first file charges with the appropriate state or local agency. Section 706(c) (42 U.S.C. §2000e-5(c).[5] Prior to the 1972 amendments, the courts had no difficulty holding that findings of a state agency or even a settlement

[5]The provisions which are now contained in Section 706(c) are substantially identical to those contained in Section 706(b) under the 1964 Act.

arranged by a state agency did not preclude the federal courts from hearing the identical charges. See *I.B.E.W., Local 5 v. EEOC*, 395 F.2d 248, 250 n. 3 (3rd Cir. 1968), *cert denied* 393 U.S. 1021 (1969) (State no cause decision does not prevent pursuit of Title VII remedies); *Voustis v. Union Carbide Corp.*, 452 F.2d 889 (2d Cir. 1971) (settlement does not bar federal suit); *Cooper v. Phillip Morris, Inc.*, 464 F.2d 9 (6th Cir. 1972) (Final order in state proceedings does not bar Title VII action).

In passing the Equal Employment Opportunity Act of 1972, Congress dealt directly with the question of whether or not the findings of state or local agencies would bind the EEOC or the courts. Congress specifically refused to preclude either the EEOC or the federal courts from hearing claims adjudicated by state or local employment discrimination agencies. Congress required only that "in determining whether reasonable cause exists, the *Commission* shall accord substantial weight to final findings and orders made by State of local authorities." Section 706(b) (42 U.S.C. §2000e-5(b)) (Emphasis added). Since, as we will discuss below, the finding of reasonable cause is not binding on the federal courts at all, Congress rejected putting any restriction on the federal courts even in circumstances in which state or local authorities had made "final findings and orders."

Nor has Congress allowed EEOC itself to restrict the federal courts' authority and responsibility to adjudicate and end employment discrimination. Prior to the passage of 1972 amendments, the courts had held that a finding of no reasonable cause by the Commission did not preclude a private right of action in federal court on that charge. *Fekete v. U.S. Steel Corp.*, 424 F.2d 331 (3rd Cir. 1970); *Flowers v. Local No. 6 Laborers Int'l Union of America*, 431 F.2d 205 (7th Cir. 1970); *Beverly v. Lone Star Lead Constr. Co.*, 437 F.2d 1136 (5th Cir. 1971);

Robinson v. Lorillard, 444 F.2d 791 (4th Cir. 1971). As the court in *Beverly v. Lone Star Lead Constr. Co.* put it:

> "The Commission is neither required nor physically able to conduct an 'in depth' investigation in every case. . . . The Commission possesses no power of enforcement, it cannot fix a penalty, issue a citation, or grant a cease and desist order. . . . [T]he courts afford the only effective remedy under the present state of the law. Lawsuits and disputes are for the courts. We will not permit the single finding of this investigative agency to stand as a complete defense which precludes all hope of adversary adjudication or remedial action." 437 F.2d at 1141

The 1972 amendments give specific Congressional sanction to this interpretation. Under the Act as amended:

> "If a charge filed with the Commission . . . is dismissed . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such a notice a civil action may be brought against the respondent named in the charge." Section 706(f)(1) (42 U.S.C. §2000e-5(f)(1)).

Thus, Congress specifically refused to make a determination by the EEOC binding on the federal courts.

The refusal of Congress to give binding effect to determinations of either state agencies or the EEOC are evidence of the strong concern which Congress has for the elimination of employment discrimination and the intent of Congress that the federal courts be the final arbiter of claims arising under Title VII. This policy is so strong and the problem so difficult to eradicate that Congress has employed a variety of overlapping and parallel remedies and has repeatedly refused to allow resort to any of these remedies to preclude use of the others. See generally, S. Hebert and C. Reischel, *Title VII*

and Multiple Approaches to Eliminating Employment Discrimination, 46 N.Y.U. L. Rev. 449 (1971).

The remedies created by Congress, the Courts and the Executive are as follows: The statutory remedies for employment discrimination include the Civil Rights Act of 1866 (42 U.S.C. §1981); the Civil Rights Act of 1971 (42 U.S.C. §1983–which applies to employment discrimination involving state action); a private action under Section 706 of Title VII; an enforcement action by the Equal Employment Opportunity Commission under Section 706 of Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972; and a pattern and practice suit under Title VII. The President has issued a series of executive orders dating back to 1941 forbidding racial discrimination by government contractors. The latest major revision of these executive orders, E.O. 11246, created an Office of Federal Contract Compliance (OFCC) which administers a broad-ranging system to regulate the employment practices of employers with whom the government contracts. Moreover, certain regulatory agencies have recognized their responsibility not to sanction or support racial discrimination in the industries. See e.g., In the Matter of In Re Petitions filed by EEOC, FCC. Docket No. 19143 (Proceedings against AT&T). Moreover, under the Labor Act additional remedies for racial discrimination are available. See *Steele v. Louisville and Nashville Railway*, 323 U.S. 192 (1944) (duty of fair representation); *United Packinghouse Workers v. N.L.R.B.*, 416 F.2d 1126 (D.C. Cir., 1969) (unfair labor practice charge). There have been numerous holdings that the remedies are supplemental to each other and do not have preclusive effect on the others. See, *United Papermakers Local 189 v. United States*, 416 F.2d 980 (ruling by OFCC that affirmative action plan was appropriate would

not bar pattern and practice action by the government under Title VII); *Williamson v. Bethlehem Steel Company*, 468 F.2d 1201 (2d Cir. 1972), *cert. denied* (April 16, 1973) (suit by the attorney general does not bar private cause of action); *U.S. v. Operating Engineers Local 3*, ___ F. Supp. ___, 4 FEP Cases 1088 (N.D. Calif. 1972) (settlement agreement by U.S. in pattern and practice suit under Title VII does not bar private right of action under Title VII); *Tipler v. E.I. Dupont*, 443 F.2d 125 (6th Cir. 1971) (adverse determination by NLRB of unfair labor practice charge does not bar Title VII action).

In passing both Title VII of the Civil Rights Act of 1964 and the amendments to it embodied in the Equal Employment Act of 1972, Congress was not only aware that there were overlapping remedies for remedying employment discrimination, it specifically sanctioned their use and refused to make any remedy the exclusive method of enforcing this national policy. Thus, in the debates concerning the passage of Title VII, 1964, Senator Clark specifically stated that:

> "Title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other federal and state statutes. If a given action should violate both Title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction." 110 Cong. Rec. 7207 (1964).

And the Senate rejected a proposal which would have made Title VII the exclusive means of relief in employment discrimination cases. 110 Cong. Rec. 13650-13652 (1964).

In passing the 1972 amendments, Congress gave these problems close and careful attention and Congress again refused to back away from its strong position in favor of multiple remedies for employment discrimination. First,

although the 1972 amendments granted to the EEOC the right to bring an enforcement suit in the federal courts, the private right of action was preserved. Section 706(f), 86 Stat. 105-106 (1972). A private party may bring suit if the Commission dismisses his charge[6] or enters into a conciliation agreement unacceptable to him, or if the Commission does not act upon his charge expeditiously.[7] The private action was preserved to ensure that individuals could resort to the courts where the Commission concluded that there were insufficient grounds to warrant suit by the government, or where Commission action had produced unsatisfactory results. 118 Cong. Rec. S. 3462 (March 6, 1972); 118 Cong. Rec. H. 1862-1863 (1972) (Section-by-Section Analysis submitted by conference managers of the bill.) Thus, under the 1972 amendments, as in 1964, Congress recognized that "an individual's right to relief are paramount under Title VII"[8] and provided resort to the courts in order to guarantee them.

The holding of the court of appeals that decisions in the arbital forum preclude all resort to the courts is therefore clearly inconsistent with the statutory scheme of preserving the paramount role the federal courts in enforcing nondiscrimination in employment. "Confidence to the extent that Congress was willing to

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[6]Compare *General Drivers, Chauffeurs and Helpers, Local 886 v. NLRB*, 179 F.2d 492 (C.A. 10) (Refusal of General Counsel of N.L.R.B. to initiate suit not reviewable.)

[7]Section 706(f)(1) provides in pertinent part:

"If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party . . . a civil action may be brought . . . by the person claiming to be aggrieved . . . ."

[8]Section-by-Section Analysis, id.

dispense it, reposes finally with the Federal Courts." *Hutchings v. U.S. Industries, supra,* 428 F.2d at 311.

Second, there was a specific attempt to make Title VII the exclusive remedy for unlawful employment practices. Congressman Erlenborn apparently considered pre-emption of other remedies by Title VII a major aspect of his bill. In an explanation of H.R. 9247 (passed by the House as H.R. 1746) he stated:

> Section 3(b) of the bill adds a provision that charges filed under Title VII shall be the exclusive federal remedy for persons claiming to be aggrieved by discriminatory practicus (sic) of covered respondents... One effect of this section is to supercede employment discrimination proceedings now being filed under the Civil Rights Act of 1866 and the National Labor Relations Act, amongst others.
>
> H.R. 9247, 92nd Congress
> 1st Session (1971)

Nonetheless, Congress refused to do so and the Senate Committee made it clear that neither the "provisions regarding the individual's right to sue under Title VII nor any of the provisions of this bill are meant to affect existing rights granted under other laws." Senate Report No. 415 at 24. See generally, G. Sape and T. Hart, *Title VII Reconsidered–the Equal Employment Act of 1972,* 40 G.W.U. Law Rev. 824, 884-888 (1972).

Third, an attempt was made to consolidate the Office of Federal Contract Compliance with the EEOC. This provision passed the Senate but was deleted in the conference and the independent status of the OFCC as an arm of the Department of Labor was preserved. Fourth, even though the EEOC was given enforcement powers under Section 706, and the authority to bring pattern and practice suits under Section 707 previously vested in

the Department of Justice was transferred to the EEOC, the power was given to the Attorney General to bring pattern and practice suits against state and local governments.

These decisions by the Congress are clear evidence that the Congress weighs the national policy against discrimination much more heavily than any need to consolidate the various remedies in any single place. The policy against employment discrimination far exceeds any considerations of administrative efficiency.

The role of arbitrators and arbitration awards is given no specific mention in Title VII. This is in sharp contrast to the role of EEOC and the state and local agencies—agencies with specific expertise in the areas of employment discrimination—which have been given a very limited role in adjudicating charges of employment discrimination. Moreover, where Congress has intended to confer a special status on arbitrators, it has done so specifically. See NLRA §203(d), 29 U.S.C. 173(d).[9] It is simply not credible to suggest that Congress intended to confer on an arbitrator, who is given no special status under Title VII, power to oust the federal courts from hearing a claim of employment discrimination when this power has been denied the administrative agencies with direct responsibility for, and expertise in, handling these charges.

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[9] See discussion of the status of arbitration under the Labor Act, pp. 24 to 27, *infra*.

B. The Purposes of Arbitration and Title VII Differ

1. *Enforcement of the National Policy Against Employment Discrimination Cannot Be Entrusted to the Grievance-Arbitration Process*

Even if Congress had not so clearly manifested its intent to place ultimate responsibility on the federal courts to adjudicate claims of employment discrimination, an analysis of the purpose, function and practice of the grievance-arbitration process makes it clear that this mechanism cannot be trusted, absent judicial review, to effectuate the policies embodied in Title VII.

The arbitration process receives specific sanction under the National Labor Relations Act (NLRA). The purpose of the Act is to promote industrial harmony by setting and enforcing fair rules for the interaction among the employers, unions and employees, by promoting the collective bargaining process as the principal means for the resolution of disputes between labor and management and by regulating the economic self-help activities of the parties to such disputes when the collective bargaining process fails to do so. The Act recognizes the rights of employees to join together to protect their collective interests; it seeks to safeguard this right, but is essentially not concerned with the ultimate resolution of a labor-management dispute, so long as the processes for arriving at the resolution are fair and regular and the waste, disruption and violence engendered by strikes and other means of economic warfare are avoided.

Arbitration is a process designed to channel disputes arising during the life of an agreement into a dispute resolution machinery which was created by collective bargaining to reinforce the bargaining powers. *Republic Steel v. Maddox*, 379 U.S. 650 (1965). As such, the

arbitration process receives specific sanction under the Labor Act as an effective tool for executing that Act's overall purpose of industrial harmony. See NLRA §203(d), 42 U.S.C. §173(d). Over the years, labor and management have both recognized the effectiveness of the grievance arbitration process as a tool for resolving their disputes. The Union gets for its membership a fast, relatively informal and inexpensive method of resolving grievances of individual members or groups of members. The employer obtains as a *quid pro quo* for the use of this mechanism an agreement from the union not to strike over issues which may be subjected to this process. See *Boys Market, Inc. v. Retail Clerk's Union, Local 770,* 398 U.S. 235 (1970); *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195 (1962); *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957). All parties presumably benefit from the avoidance of any strikes over such issues.

The process is, of course, limited by its own purposes. Arbitration is a creature of the collective bargaining agreement which creates it and accordingly must conform to the expectations of the parties who entered into the collective bargaining agreement. *United Steelworkers of America v. Enterprise Wheel and Car Corp.,* 363 U.S. 593, 597 (1960). Moreover, since the contractual rights of the individual are created by the collective bargaining process, the Act contemplates that the union may, in good faith, lawfully sacrifice the rights of the individual in the best interest of the majority. *Vaca v. Sipes,* 386 U.S. 171 (1967); *U.S. Bulk Carriers, Inc. v. Arguelles,* 400 U.S. 351, 361 (1971) (Harlan, J. Concurring). *Humphrey v. Moore,* 375 U.S. 335 (1964).

As we have discussed above, the basic purpose of Title VII is to end employment discrimination based upon race, national origin, sex or religion. Thus, Congress in passing Title VII did not create a neutral umpire, like the

NLRB, to call balls and strikes in the game between labor and management. Nor did it seek to promote harmony or nurture the collective interests of the majority at the possible sacrifice of minority rights. To the contrary, the emphasis on Title VII is to disrupt the *status quo* of discrimination which Congress found to exist when it passed both the original Act of 1964 and the 1972 amendments;[10] it sought to protect individuals and minority groups from the deplorable conditions of discrimination under which they were and still are forced to work and to provide effective remedies for these conditions. As the court stated in *Culpepper v. Reynolds Metals:*

> "Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination." 421 F.2d at 891.

Given the contrasting and conflicting purposes of arbitration under the NLRA and the private right of action under Title VII, one would expect that the arbitration process would receive greater deference from the NLRB than it would from the federal courts under Title VII. The decision of the courts below, however, gives to the arbitration process a status which the NLRB

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[10]This has led to reshaping of the standards by which the legality of conduct is judged. Thus, conduct which was lawful under the Labor Act became unlawful under Title VII. Compare *Whitfield Local 2708 v. United Steelworkers*, 263 F.2d 546 (5th Cir.) *cert denied* 360 U.S. 902 (1959) (Collective bargaining agreement lawful under Labor Act) with *Taylor Armco Steel Corp.*, 429 F.2d 448 (5th Cir. 1970) (identical agreement unlawful under Title VII); and compare *Howard v. St. Louis, S.F. Ry.*, 361 F.2d 905 (8th Cir. 1966) (Railway Labor Act) with *Norman v. Missouri Pac. RR*, 414 F.2d 73 (8th Cir. 1969) (Title VII).

has specifically denied to it under the NLRA. As a matter of both law and practice, the Labor Board has refused to preclude itself from inquiring into the merits of an unfair practice charge whose subject matter has been heard before an arbitrator. *Lodge No. 12 v. Cameron Iron Works*, 257 F.2d 457 (5th Cir. 1958); *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955); see generally, Note, the *NLRB and Deference to Arbitration*, 77 Yale L.J. 1191 (1968).

We submit that at the very least under Title VII, the federal courts must take their responsibility to end employment discrimination as seriously as the Labor Board takes it responsibility to execute national labor policy. Indeed, we shall show below that the federal courts must be even more rigorous than the Labor Board in protecting individual and minority group rights.

2. *The Grievance Arbitration Process Is Not a Reliable Mechanism for Adjudicating Claims of Employment Discrimination.*

Given the purposes and functions of the arbitration process, it is not surprising that this process does not have the characteristics which make it a desirable method to resolve claims of racial and other forms of employment discrimination. In the first place, the process is written, designed and controlled by the employer and the union. Since both the employer and the union are subject to charges of discrimination under Title VII, they have a built-in conflict of interest between their collective interests and that of individuals or minority groups charging discrimination. See W. Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. Pa. L. Rev. 40, 46, 49 (1968) (employers and union "view minority members as a disruptive intrusion into what

otherwise might be a smooth-working bilateral agreement").[11] The conflict is especially serious with respect to the unions because in most cases the union has virtually total control not only over whether a particular grievance goes to arbitration, but also over the vigor with which any given grievance is pressed before the arbitrator. *Vaca v. Sipes, supra* (only duty imposed on union is not to act arbitrarily or in bad faith).

As more and more cases are decided under Title VII, it is becoming increasingly clear that collective bargaining agreements are the embodiment of discrimination against the classes of people protected by Title VII. See e.g., *Quarles v. Phillip Morris Co.*, 279 F. Supp. 505 (E.D. Va. 1968) (Collective bargaining agreement froze blacks in discriminatory conditions); *Robinson v. Lorillard Corp., supra* (union pressure forced discriminatory seniority provisions in agreement); *U.S. v. Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971) (collective bargaining agreements dating back to World War I discriminated against blacks); *U.S. v. United Papermakers, Local 189*, 416 F.2d 980 (5th Cir. 1969) (collective bargaining agreement perpetuated past discrimination).

It is simply not realistic to expect that there will be a reliable remedy for this very discrimination in the agreement which sanctions it. Nor is it realistic to expect

[11]For a particularly egregious example of the use of the arbitration process by employer and union, see *Hotel Employers Ass'n*, 47 L.A. 873 (1966) (Burns, Arbitrator) and analysis thereof by A. Blumrosen, *supra*, 24 Arb. J. at 95-99. In that case, the employer, under pressure from a coalition of civil rights groups, agreed to hiring goals as a remedy for past discrimination. The union grieved this agreement and a panel of arbitrators selected by the union and the employer ruled the agreement to violate federal law as well as the collective bargaining agreement. The civil rights groups were not allowed to participate in the selection of the arbitrators or the hearing.

that unions which are aware of their potential liability as defendants in Title VII actions will process grievances charging employment discrimination without regard to the collective interests of the union majority.

The infirmity of conflict of interest which permeates the arbitration process as a whole in these cases in transmitted directly to the arbitrator, since he is selected by the parties with the conflict. As one noted commentator put it:

> "[T]here is some basis for the fear that economic self-interest and the desire to be loved, which are linked with future acceptability, may distort adjudication even where there is complete harmony between the individual's interests and those of his representatives." Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. Chi. Rev. 30, 44 (1971).

Nor is conflict of interest the only problem in entrusting to an arbitrator effectuation of the national policy against racial and other forms of employment discrimination. As this Court has stated it:

> "An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not set to dispense his own brand of industrial justice. He may, of course, look to guidance from many sources, but his award is legitimate only so long as it draws its essence from the collective bargaining agreement . . . . [an award] based solely on the arbitrators view of the requirements of enacted legislation would mean that he exceeded the scope of his submission." *United Steelworkers v. Enterprise Wheel and Car Company, supra*, at 597.

Thus, the arbitration process precludes the arbitrator from ruling that discriminatory provisions of the collective bargaining agreement are unlawful. The decisions of the courts below would oust the federal courts from hearing a claim of racial discrimination which the arbitrator had no authority to decide. See e.g. *United Airlines Inc.*, 48 L.A. 727, 733 (Kahn, Arbitrator) ("jurisdiction . . . does not extend to interpreting and applying the Civil Rights Act; decision upheld "no marriage" rule for stewardesses held to be unlawful in *Sprogis v. United Airlines*, 444 F.2d 1194 (7th Cir. 1971) *cert. denied* 404 U.S. 991 (1971)).

As a corollary to this lack of authority, arbitrators lack the expertise to decide questions of discrimination under Title VII. They are selected for their expertise in the industry and for their knowledge of the collective bargaining agreement, but are neither expected to, nor do they, as a matter of practice, base their decisions on the laws against employment discrimination. See e.g. *The Ingraham Co.*, 48 L.A. 884 (Yagoda, Arbitrator) ("We are not the Equal Employment Opportunity Commission and should not put ourselves in its place in terms of our rights or ability to enforce the law which they administer"); *Pitman-Moore Div.*, 49 L.A. 709, 718 (Seinsheimer, Arbitrator) ("it is not up to the Arbitrator to interpret federal law. My responsibility has only to do with determining if the Company has violated the Contract").

The limited authority of the arbitrator presents a number of insurmountable deficiencies in the arbital process which preclude substantial reliance on it as a basis for ending employment discrimination. Because the arbitrator is limited to resolution of the specific grievance of the individual, he cannot deal with the class problems inherent in any charge of race, national origin, sex or

religious discrimination. The courts have long recognized that such discrimination is discrimination against the class by its very nature. *Hall v. Werthan Bag*, 251 F. Supp. 184 (D. Tenn. 1966); *Jenkins v. United Gas, supra.* And because of this have allowed individual employees to challenge across-the-board practices of discrimination. See e.g. *Johnson v. Georgia Highway Express*, 417 F.2d 1122 (5th Cir. 1969); *Mack v. General Electric Company*, 329 F. Supp. 72 (E.D. Pa. 1971). If authority were to be reposed in the arbitrator to resolve the specific claims of individuals and that decision were a bar to further proceedings in the federal courts, the purposes of Title VII to end discrimination would be severely hampered.

Closely related to the problem of the arbitrator's limited authority to deal with the class problem is his circumscribed authority to grant adequate remedies. Experience thus far under Title VII has provided a number of examples of cases in which the remedy was a total modification of the provisions of the collective bargaining agreement. See e.g. *Long v. Georgia Kraft Co.*, 450 F.2d 557 (5th Cir. 1971) (parties to collective bargaining agreement unable to work out remedy); *United States v. Bethlehem Steel Corp.*, 446 F.2d 452 (2d Cir. 1971) (transfer and seniority provisions revised); *EEOC v. Plumbers Local 189*, ___ F. Supp. ___, 5 FEP Cases 133 (S.D. Ohio 1972) (referral provisions of collective bargaining agreement totally revised); *United States v. Sheetmetal Workers, Local 36*, 416 F.2d 123 (8th Cir. 1969) (referral provisions revised). An arbitrator simply cannot order this kind of relief. Precluding a victim of discrimination who grieved any of the discriminatory practices found in these cases from federal court suit would deny him any hope of obtaining a remedy.

As the court pointed out in *Jenkins v. United Gas, supra*, every Title VII claim embodies issues specific to the claimant and issues which relate to the class which the private litigant serves as a "private attorney general". It is not hard to imagine that an individual may need the quick, inexpensive relief available to him under a collective bargaining agreement while entertaining a long-range intent to end the practice complained of as it effects his class. The courts below would cut off the right of the employee to be a class representative as the price for seeking speedy relief under a contract. For, win or lose, the right of federal action is forfeited if the case is arbitrated. How little sense this makes in light of the observations of the court in *Jenkins* that it is the duty of the courts to cure not only the specific ill complained of by the victim of discrimination, but to end the practice that was the swampy source of the malaise.

The practical necessity of keeping the arbitration process fast and inexpensive exacerbates problems created by the limited scope of the arbitration process. For example, there is usually no provision for discovery by representative of the grievant in presenting his case to the arbitrator. See R. Smith, L. Merrifield and D. Rothschild, *Collective Bargaining and Labor Arbitration*, 217-218 (1970). Although the union may investigate, there is no requirement that it conduct a broad ranging investigation into related practices. And thus, the safeguards of EEOC investigation which protects the layman who may not accurately draft or understand the nature of the discrimination practices against him are not available in the arbitration process. Even where the union is acting in total good faith, its lack of expertise in the area of employment discrimination and its lack of resources to discover and investigate evidence may severely hamstring its efforts to present a grievant's case

to the arbitrator. To allow a process with such infirmities to bar the federal courts from hearing the claims would defeat the underlying purposes of Title VII by making it much more difficult to deal effectively with practices of discrimination.

Finally, it should be noted that other aspects of the arbitration process created by the need for an inexpensive remedy also make the decision of the arbitrator inherently inadequate as a substitute for a federal court hearing. These include the fact that generally the grievant is not represented by counsel, that the rules of evidence need not apply, that witnesses need not be sworn,[12] that cross examination is not necessarily used,[13] and that careful fact finding is not necessarily required.[14] We submit that the shortcuts necessitated by the purpose of the arbitration process render it an inappropriate mechanism for deciding important, complex questions involved in employment discrimination cases.

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[12]See Elkouri & Elkouri, *How Arbitration Works*, 155-156 (1960).

[13]See R. Fleming, *The Labor Arbitration Process*, Ch. 7 (1965).

[14]*United Steelworkers v. Enterprise Wheel and Car Corp., supra*, 363 U.S. at 598 ("Arbitrators have no duty to the court to give their reasons for an award").

II.

THE NATIONAL POLICY AGAINST RACIAL DISCRIMINATION IN EMPLOYMENT AND THE NATIONAL LABOR POLICY CAN BEST BE SERVED BY GIVING AN ARBITAL AWARD ONLY SUCH EVIDENTIARY WEIGHT AS IT DESERVES.

From what has been discussed thus far, it is clear that a rule which would preclude the federal courts from hearing charges of racial discrimination which are based on claims which were the subject of a grievance and an arbitration award should be rejected. Deciding that a preclusion rule is inappropriate, however, does not resolve the issue raised in the instant case since the courts below on remand would still have to decide whether they should defer to the arbitrator's award in the circumstances of this case. Nor does it resolve the conflict in the circuits over the appropriate standards to be applied in deciding whether an arbital award should have any effect on a federal court suit under Title VII. We submit that it is both necessary and desirable for the Court to set out standards in this confused area in order to give guidance not only to the courts below on remand, but all of the lower federal courts which have wrestled with the question raised here.

We submit that the considerations which make an automatic preclusion rule improper also make a rule giving even conditional preclusive effect to arbitration awards unwise. Moreover, we believe that the best way to accommodate national labor policy and national employment discrimination policy is to prevent the use of any of these remedies from barring pursuit of any other.

As we have indicated above, in cases where the subject matter of an unfair labor practice charge has been brought before the arbitrator prior to charges being filed

with the NLRB, the Labor Board does not automatically defer to the decision of the arbitrator. *Lodge No. 12 v. Cameron Iron Works, supra.* Rather, the Board determines whether "the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of this Act"; only if all these conditions are met will the labor board defer to an arbital award. *Spielberg v. Manufacturing Company, supra,* 112 NLRB at 1082.

Two courts of appeals have dealt directly with the question of whether the approach used by the Labor Board in deciding an arbitrator's award can best be adapted to the special problems of enforcement of Title VII rights. In *Bowe v. Colgate,* 416 F.2d 711 (7th Cir. 1969), the Seventh Circuit cited *Spielberg* for the proposition that the arbital award does not deprive the federal courts of power to hear actions under Title VII; the court held that aggrieved employees can "utilize dual or parallel prosecution both in court and through arbitration so long as election of remedy was made after adjudication so as to preclude duplicate relief which would result in unjust enrichment." 416 F.2d at 715.

The Court of Appeals for the Fifth Circuit has also held that an arbital award does not preclude federal court suit, but that the courts in Title VII cases should defer to arbitrator awards only when the following criteria are met:

> "First, there may be no deference to the decision of the arbitrator unless the contractual right coincides with the rights under Title VII. Second, it must be plain that the arbitrator's decision is in no way violative of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII. In addition, before deferring, the district court

must be satisfied that (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under collective agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbital hearing dealt adequately with all factual issues; (4) the arbitrator actually decided the factual issues presented to the court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities." 467 F.2d at 58.

We submit that the approach of the Seventh Circuit in *Bowe* best effectuates the policies of Title VII while not unduly interfering with national labor policies. The valid considerations set out by the Court in *Rios* should go to the weight of the arbitrator's award as evidence.

The *Bowe* approach guarantees that the federal courts will continue to carry out the responsibilities placed on them by Congress to effectuate the national policy against racial and other prohibited forms of discrimination in employment. It assures that the federal district judge before whom a complaint of racial discrimination properly comes will meet this responsibility with a determination on the merits of the claim and not abdicate his responsibility to an arbitrator selected by parties who may be charged with discriminating. Thus, it is clear that as far as the effectuating, the policies embodied in Title VII are concerned, the *Bowe* rule is best. If some other approach is to be used, it must be because some other considerations outside of Title VII's strong policy against employment discrimination outweighs this public interest.

A priori, a judgment by the courts that other policies outweigh the public interest in ending employment discrimination is highly suspect since this Court has stated that the national policy against racial dis-

crimination is "of the highest priority". *Newman v. Piggie Park Enterprise,* 390 U.S. 400, 88 S.Ct. 964 (1968). The arguments in favor of limited deferral are so insubstantial, however, that they would not outweigh even lesser governmental interests.

The three courts of appeals which have indicated that deferral to the decision of an arbitrator would be proper in any circumstances, have between them, advanced only two reasons for such deferral. The opinion in *Rios v. Reynolds Metals Co.,* 467 F.2d 54 (5th Cir. 1972) summarizes them as follows:

> In some instances such a requirement would not comport with elementary notions of equity, for it would give the employee, but not the employer, a second chance to have the same issue resolved. More importantly, such a requirement would tend to frustrate the national policy favoring arbitration. An employer would have little incentive to agree to arbitrate under a system where only the employee, in the event of an adverse arbital determination, would have an opportunity to relitigate the matter in court.

See also *Dewey v. Reynolds Metals, supra* (If "employer but not the employee is bound by arbitration [t]his result could sound the death knell to arbitration of labor disputes"); *Alexander v. Gardner-Denver Co.* (App. 42) ("We cannot accept a philosophy which gives the employee two strings to his bow when the employer has only one.") None of these arguments withstand critical analysis.

The argument that it would be unfair to the employer to allow an employee a second chance is directly contrary to the whole body of case law which has sanctioned multiple remedies for employment discrimination in order to effectuate the strong national policy against such

discrimination. See Section I.A.2, *supra*. The courts below were concerned that allowing an employee to pursue both his contractual and statutory rights would somehow give that employee an unfair advantage over his employer. This is simply absurd. The employer has control over the employee's economic welfare and ability to earn a living; the employer has economic resources which the employee can only dream about; he can hire and pay for legal defense for his actions and he can delay legal proceedings for so long that any ultimate relief obtained by an employee in court may arrive long after it can do the employee any good. For these reasons it makes no sense to talk about an employee having the advantage of "one and a half" or "two strings to his bow"; the employer has armored columns and nuclear weapons. We submit that the more proper interpretation of the conflict between an employee and an employer over employment discrimination is that of the Fifth Circuit which has characterized it as a "David and Goliath confrontation". *Sanchez v. Standard Brands,* 431 F.2d 455, 464 (5th Cir. 1970) ("In such a confrontation, surely Goliath should not be allowed to fell David with the help of a club fashioned from forms and legal technicalities. The most elementary principles of justice require us to remove this club and compel a battle on the *merits* of the controversy.")

The second argument advanced in favor of deferral is that making the arbitration award binding on the employer but not on the employee will "sound the death knell" of arbitration by removing the employer's incentive to enter into collective bargaining agreements with arbitration clauses in them. This argument is wholly specious. The fact of the matter is that the employer enters into agreements with arbitration clauses in them in

order to obtain a no strike clause; it is the incentive to avoid costly and disruptive strikes and not the outcome of any particular arbitration case which motivates the employer to bind himself to arbitration. See, *Boys Market Inc. v. Retail Clerks Union Local 770, supra; Sinclair Refining Co. v. Atkinson, supra; Textile Workers Union v. Lincoln Mills, supra.* The performance of employers in the past gives ample assurance that no serious impact on the employers desires to enter into arbitration clauses would result from that policy of no deference to the decisions of arbitrators. For example, the decision in *Sinclair Refining Company v. Atkinson, supra,* called into question whether an arbitration clause could be enforced as the *quid pro quo* for a no strike clause; indeed the dissent stated that "the decision delivers a crippling blow to the cause of grievance arbitration itself". 370 U.S. at 327. Nonetheless, in a four-year period of time after the decision of *Sinclair* (prior to its reversal in *Boys Market, supra*) 90% of the collective bargaining contracts contained arbitration clauses. Bureau of Labor Statistics, U.S. Department of Labor, *Major Collective Bargaining Agreements–Arbitration Procedures,* Bulletin No. 1425-6 (1966). Similarly, the experience under the NLRA also indicates that the likelihood of subsequent litigation does not deter parties from entering into arbitration clauses. The Labor Board for substantial periods of its recent history has refused to defer to arbital decisions. See Note, *the NLRB and Deference to Arbitration, supra,* 77 Yale L.J. at 1204-1208. From 1960 to 1964, the Labor Board deferred in only 23% of arbitration cases; from 1965 to 1967 it deferred in only 12% of the cases; from 1965 to 1967 it deferred in only 2 cases involving employer or union discrimination. *Ibid.* Nonetheless, a recent representative sampling of collective bargaining agreements

indicated that 94% contained arbitration clauses. Bureau of National Affairs, *Labor Relations Year Book: 1970* 38. These statistics indicate that the arbitration process is a hearty one and that allowing the victims of racial discrimination to pursue statutory remedies is no threat to the process.

To the contrary, we submit that any rule which involves preclusion of the statutory by the remedy by pursuit of a grievance will inevitably result in less reliance on the grievance machinery by the victims of racial discrimination. As the court indicated in *Culpepper v. Reynolds Metals, supra,* this is directly contrary to Title VII's emphasis on voluntary compliance. On the other hand, if the employee can pursue his grievance remedy prior to resorting to Title VII, this will allow the arbitration process to work as a screening device in those cases where the employee is satisfied with the result of the arbitration. It will also encourage employees to use the arbitration process, and therefore strengthen that process.

For the above reasons, we submit that there is no substantial reason for allowing even limited deference to arbital awards. See Meltzer, *supra,* 39 U. Chic. L. Rev. at 45-46. If the Court is to consider allowing such deference at all, we believe it must deal with the inherent inadequacies of the arbital process as a tool for enforcing Title VII's purposes. Primary, among these inadequacies is the fact as discussed above that both the arbitrator and the union often have a conflict of interest with the Title VII grievant. At the very least, if the decision of an arbitrator is in any circumstances to deprive a person alleging to be discriminated against from his day in federal court, he must be allowed a full opportunity to prosecute his own claim in the arbitration hearing and to

have adequate counsel of his own. See Edwards and Kaplan, *Racial Discrimination and the Role of Arbitration Under Title VII*, 69 Mich. L. Rev. 599, 651-652 (1971). We doubt, however, that even the full control of the arbitration hearing by the grievant who is represented by counsel would render the process sufficiently reliable for a federal court to defer to the process. Instead, we submit that the criteria suggested in *Rios* should be applied to an arbital award, not for the purposes of whether the case should be heard on its merits, but rather for the purposes of what weight to give the arbital award for evidence. See *Smith v. Universal Services Inc.*, 454 F.2d 154 (5th Cir. 1972) (EEOC investigation and finding of probable cause admissible as evidence of discrimination even though a finding of "no cause" would not bar suit).

III.

DEFERRAL IN THE INSTANT CASE WOULD BE IMPROPER AND UNFAIR.

Applying the principles we have discussed to the facts of the instant case, it is clear that the decisions of the court below to defer to the arbital award should be reversed. Indeed, the instant case provides an excellent example of the dangers and deficiencies of a rule which will allow a federal court to dismiss a claim of racial discrimination on the basis of an arbital award, without ever reaching the merits of that claim.

In the instant case, petitioner attempted to separate out his statutory claim of racial discrimination from his contract grievance of unjust discharge. He did this after he had reached the conclusion that the union was not vigorously processing his grievance. Accordingly, prior to the arbitration hearing, he filed charges of racial dis-

crimination with the Colorado Civil Rights Commission—the first step in perfecting his right to federal court suit. Sixty days later, his charge was filed with the EEOC which had his charge before it for five weeks prior to the arbitrator's decision. At the arbitration hearing, petitioner specifically informed the arbitrator that his charges of racial discrimination were pending before the appropriate administrative agencies. He was not represented by counsel at the hearing, but did inform the arbitrator that he was dissatisfied with the union's representation of him with respect to the issue of racial discrimination. The arbitration decision itself confirmed petitioner's fears with respect to the quality of representation he received from the union since the arbitrator specifically found that on the issue crucial to determination of discrimination—whether it was the company's practice to transfer rather than discharge trainees who were not performing well—that he had "no way of knowing if this had been the practice or not. Certainly this unsupported statement [of the union] falls far short of proving a well-established past practice." (App. 22).

Thus, in the instant case petitioner specifically requested that the issue of racial discrimination not be heard in the arbitration proceeding. He gave as his reasons for not wishing the issue heard that he felt unable to represent himself before the arbitrator, that the union representation of him on this issue was unsatisfactory, and that he had no counsel of his own. He instead indicated that he wished the appropriate administrative agencies to handle these charges. The arbitrator, having been informed of these circumstances refused to decide the issue. He instead indicated his doubts on it and suggested, without deciding, that it might be appropriate to reinstate petitioner in his former job. Under these

circumstances it is manifestly unjust and unfair to bind plaintiff to the nondecision of the arbitrator.

The injustice of binding petitioner in this way is all the worse because the rationale of the courts below in relying on *Dewey v. Reynolds Metals Company, supra,* is that petitioner made an "election of remedies" when he pursued his grievance rights prior to filing charges to perfect his statutory right to be free from racial discrimination. The circumstances of this case make it perfectly clear that petitioner made no election in favor of the grievance machinery at all. Indeed if he made any election, it was to pursue the Title VII remedy in preference to the grievance remedy. Even the Sixth Circuit which enunciated the *Dewey* doctrine of election of remedies only holds that a binding election is made when the arbitrator *decides* the grievance prior to the filing of charges with the appropriate fair employment agencies. See *Spann v. Joanna Western Mills Co., supra; Newman v. AVCO Corp., supra; Thomas v. Philip Carey, supra.* See also, *Tipler v. E.I. du Pont de Nemours and Co., supra.*

If the court were to announce a rule of election of remedies, we submit that such an election could be effective only if it were knowingly made. Cf. *Fay v. Noia,* 372 U.S. 391, 439 (1963). Thus if an election of remedy rule is to be announced it should operate prospectively, since petitioner in this case could not have known what the appropriate action to take was.[15] This is especially

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[15]Whether a waiver is "knowing" or "voluntary" is highly questionable where the person who makes the decision is a layman usually without legal counsel who is likely to be unaware of the consequences of his action. Cf. *Sanchez v. Standard Brands, supra; Antonopolous v. Aerojet-General Corp.*, 295 F. Supp. 1390 (E.D. Calif. 1968).

true, since this court has never ruled on the question of whether the Title VII charging party must exhaust the grievance arbitration machinery prior to filing Title VII charges. See *Dewey v. Reynolds Metals*, 291 F. Supp. 786 (W.D. Mich. 1968):

> "It is understandable that any union member would first proceed to raise any rights he felt were due him under the contract. Proceeding first through arbitration is in accord with federal labor law . . . Plaintiff should not be penalized for first proceeding with his contractual remedies through the arbitration process as preferred and indeed mandated by federal labor law. He should retain his rights to also bring a civil rights action."

CONCLUSION

For the reasons stated above, the decisions of the courts below should be reversed and the cause remanded to the district court for proceedings on the merits of petitioner's claims; the remand should direct the district court to award attorney's fees.[16] Because of the con-

[16]Petitioner is represented by appointed counsel who have borne the burden of prosecuting his claim to this Court. Petitioner has been forced to carry his claim to this Court in order to obtain a hearing on the merits. The issue involved in the instant case is one of great public importance and the resolution of that issue will be of great public benefit; a rule announced by this Court will have as profound effect on the administration of the Title VII remedy as an injunction. For these reasons this Court should remand the present case to the district court with instructions to award petitioner an appropriate counsel fee for all of the services rendered in obtaining him the hearing on the merits. Such an award of attorneys fees to a successful appellant is authorized by Title VII and cases decided under it. Section 706(k) (42 U.S.C. §2000e-5(k); *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968); *Green v. McDonnell Douglas Corp.*, 463 F.2d 337 (8th Cir. 1972); *Malone v.*

fusion in the lower courts over the appropriate standards to apply in evaluating the effect of an arbital award on Title VII claim, the court should announce uniform standards for the lower courts to apply in such cases. We submit that the appropriate rule would be that arbital awards should be given only such evidentiary weight as the trial court deems they are entitled.

Respectfully submitted,

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North American Rockwell Corp., 457 F.2d 779 (9th Cir. 1972); *Parham v. Southwestern Bell Co.*, 433 F.2d 421, 2 FEP Cases 1017, 1024 (8th Cir. 1970) (Attorney fees awarded even though no injunction entered); and *Fogg v. New England Tel. & Tel. Co.*, ___ F. Supp. ___, 5 FEP Cases 8 (D. N.H. 1972).